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Vacated by McDonald v. Bowersox, E.D.Mo., September 18, 1995
1989 WL 1128973

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United States District Court,
W.D. Missouri.

Samuel L. MCDONALD, et al., Plaintiffs,
v.
William ARMONTROUT, et al., Defendants.

No. 85-4422CVC5. | May 10, 1989.

Opinion

ORDER

WRIGHT, J.

*1 Before this Court are defendants' plan to implement the Consent Decree of May 22, 1986 at the Potosi Correctional Center, and plaintiffs' response. On March 13, 1989, this Court held that moving the capital punishment unit for men from the Missouri State Penitentiary (MSP) to the Potosi Correctional Center (PCC) does not violate Missouri Law, the United States Constitution, nor the spirit of the Consent Decree and Memorandum Agreement. In accordance with the provisions of the Consent Decree and Memorandum of Agreement, the parties filed the instant motions. For the reasons stated below, this Court approves defendants' plan to implement the Consent Decree at PCC as modified and incorporated in this order.

I. Consent Decree and Memorandum of Agreement

On May 22, 1986, the parties in the above-styled cause amicably submitted the Consent Decree to this Court in settlement of the plaintiff class' allegations of unconstitutional conditions of confinement at MSP. The Memorandum Agreement filed on December 3, 1987 modified and supplemented the Consent Decree and was approved by this Court.

The stated purpose of the Consent Decree is "to eliminate any conditions of confinement which may deny the inmates sentenced to death the rights, privileges, and immunities secured to them by the Constitution and the laws of the United States." The Consent Decree contains provisions governing the transportation of death row to a

new location. Section III, Paragraph 25 provides: "Defendants may begin housing deathsentenced inmates in such new or additional location(s) upon approval of the plan by the Court."

According to the express provisions of the Consent Decree, such a move is not to be commenced prior to defendants' filing of a plan for implementation of all rights and privileges conferred by the Consent Decree (hereinafter the Plan) with the Court, service of the Plan u on counsel for the plaintiff class, and this Court's approval of the Plan. The Memorandum Agreement provides plaintiffs' counsel with an opportunity to review and comment on the proposed plan. On March 28, 1989, defendants filed their plan. On April 27, 1989, plaintiffs filed a response to defendants' plan. The parties complied with the express provisions of the Consent Decree and Memorandum Agreement.

II. Approval of Defendants' Plan

The issue before the Court is whether the Plan ensures that the transportation of inmates to PCC does not abrogate the stated purpose of the Consent Decree and Memorandum Agreement. Portions of the Consent Decree and Memorandum Agreement concern the physical conditions of confinement of the Capital Punishment Unit as it existed at MSP and are mooted by the move to PCC. By mutual agreement of the parties, some portions of the Consent Decree and Memorandum Agreement remain in full force and effect at PCC. Other portions of the Consent Decree and Memorandum Agreement are modified by the Standard Operating Procedures of PCC in the Court-approved plan.

*2 This Court has the power to modify the Consent Decree and Memorandum Agreement to adapt to the new facilities in order to achieve the desired result—constitutional conditions of confinement. *See United States v. United Machinery Corp.*, 88 S.Ct. 1496, 1501 (1968); *United States v. Swift & Co.*, 52 S.Ct. 460, 462 (1932); *King-Seely Thermos Co. v. Aladdin Industries, Inc .*, 418 F.2d 31, 35 (2nd Cir.1969). The transfer of the capital punishment unit from MSP to PCC necessitates adaptation of this Court's Decree.

Defendants built a new prison, PCC, in Mineral Point, Missouri, containing several housing units designed to house the capital punishment unit. Treatment of inmates in this brand new facility is governed by the Standard Operating Procedure Manual. Particular provisions of this manual, though not identical in form to those in the Consent Decree and Memorandum Agreement, describe policies and procedures at PCC that ensure the goals of

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the Consent Decree will be achieved. These new policies and procedures guarantee the inmates' right to constitutional conditions of confinement and accommodate the needs of the new prison facility which is physically distinct from MSP.

This Court has determined that the Approved Plan will guarantee fair and humane treatment of plaintiffs. The purpose of the Consent Decree and Memorandum Agreement is in no way thwarted by the terms of the Approved Plan. The Approved Plan incorporates the goal of providing constitutionally adequate conditions of confinement. The elimination and modification of several provisions in the Consent Decree and Memorandum Agreement are pragmatic and efficacious.

III. Modified Consent Decree ("The Approved Plan")

This cause originated with the filing of a complaint on August 19, 1985. Plaintiffs requested that they be permitted to proceed as a class pursuant to Federal Rules of Civil Procedure 23(a), and 23(b)(1) and (2). On January 15, 1986, the Court (the Honorable Scott O. Wright) granted plaintiffs' motion for class action status and certified a class comprised of (i) all inmates presently confined under sentence of death at the Missouri State Penitentiary (MSP), and (ii) all inmates who may in the future be confined under sentence of death by the Missouri Department of Corrections and Human Resources (MDCHR), either at MSP or elsewhere.

Plaintiffs alleged in their complaint that they and all other inmates confined under sentence of death at MSP have suffered and are suffering violations of their rights under the First, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. Defendants denied that any violations of plaintiffs' constitutional rights have occurred.

Desiring an amicable settlement of this matter, the parties herein agreed to the entry of a decree and filed the same on May 22, 1986, without trial, the taking of any evidence, adjudication, or the admission of liability by any party with respect to any claim or allegation made in this action. Although no findings of fact or conclusions of law were made by the Court, this decree contemplated and was intended to eliminate any conditions of confinement which may have denied the inmates sentenced to death the rights, privileges, and immunities secured to them by the Constitution and the laws of the United States. The Court approved this decree with addendum on January 7, 1987.

*3 In January, 1989, the Potosi Correctional Center (PCC), located in the Eastern District of Missouri at

Mineral Point, Missouri, officially opened. This prison contains several housing units which have been designated to house inmates who have been sentenced to death. As PCC is a new facility, it has become necessary to modify the consent decree as said decree was based upon the totality of conditions of confinement which existed at MSP.

Certain provisions of this agreement may depend upon future appropriations by the Missouri General Assembly for implementation. Defendants agree that they shall, in good faith, request with the utmost speed such additional appropriations as may be necessary to put into effect all components of this decree, by requesting such appropriations in a request to be presented to the next session of the Missouri General Assembly, which convenes no later than in January of 1990. Defendants will in good faith make their best efforts to secure such appropriations from the Missouri General Assembly. If sufficient funds are not appropriated in the next legislative session, defendants shall make an ongoing effort to seek necessary funds. If, however, provisions of this decree are not put into effect due to the Missouri General Assembly's failure to appropriate the necessary funds, despite defendants' best efforts to secure such funds, defendants shall not be found in contempt. In that event, defendants shall, to the extent possible within the current resource levels and within future appropriation levels, implement the provisions of this decree.

WHEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

I.

This Court has jurisdiction over the subject matter of this action and of all parties hereto.

II.

A. Plaintiffs

The plaintiff class consists of (i) all inmates presently confined under sentence of death at MSP and (ii) all inmates who may in the future be confined under sentence of death by the MDCHR, either at PCC or elsewhere.

B. Defendants

Defendants are the Governor of the State of Missouri, the Director of MDCHR, the Director of the Missouri

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Division of Adult Institutions within MDCHR, and the superintendent of PCC.

Pursuant to Rule 25(d), F.R.Civ.P., the successors in office of the above-named defendants will automatically be substituted as parties in this suit and in this decree.

III.

Terms

1. *Mutuality*

- a. The responsibilities imposed by this decree are mutual.
- b. Damage to or abuse of programs, facilities or equipment by inmates will be a defense in any judicial proceedings on their behalf to cure defects in such programs, facilities or equipment occasioned by that abuse.
- c. In the event of continued or consistent abuse or misuse, the nature of which renders such programs, facilities or equipment a risk to the safety and security of inmates, staff or the institution, those programs, facilities or equipment may be substantially modified, suspended, or discontinued to the extent necessary to restore said safety and security. Defendants shall give notice to plaintiffs' counsel and file a request with the Court for modifying, suspending, or discontinuing programs, facilities, or equipment required by this decree. It is contemplated by the parties to this decree that damage, abuse, or misuse by a single individual will normally be handled by appropriate action as to that individual.

2. *Legal Mail and Materials*

- *4 a. Legal mail which is readily identifiable as such will not purposefully be opened in the mail room. Legal mail shall only be opened in the presence of the inmate as required by regulation 1S13-1.1.
- b. Legal materials which an inmate has in his cell will not be read during searches or shakedowns. Legal materials will, however, be searched for contraband during cell searches and shakedowns. Reasonable care shall be taken to avoid damage or scattering of legal materials.
- c. Inmates who believe their legal or personal mail has been improperly handled by prison staff shall notify the prison officials in writing either by letter or by grievance.

3. *Religious Services*

a. A privacy room will be provided for each unit of death row except the punitive segregation unit. This room will be used for religious services, religious counseling, psychological and psychiatric counseling, interviews and evaluations, and medical examinations. Up to two inmates shall be permitted to attend a group religious service. Defendants shall evaluate this number on a yearly basis to see whether security and management considerations would allow the increase of that number for any of the different security levels of death-sentenced inmates.

b. Minimum Custody CP inmates shall be permitted to attend group religious services for death-sentenced inmates in the chapel.

4. *Telephone Access*

- a. Minimum Custody inmates shall have access to telephones to make collect telephone calls during their release hours, seven days a week.
- b. Close Custody, administrative segregation, and disciplinary segregation inmates shall have access to telephones to make collect telephone calls by making arrangements with their case worker or other PCC staff.
- c. Telephone calls to attorneys shall be of unlimited duration unless it becomes necessary to terminate the call in order to accommodate another inmate who needs to place a call to his attorney on the same day.
- d. Calls other than those to attorneys shall be allowed to last at least twenty minutes. After twenty minutes, telephone calls shall be terminated only if necessary to accommodate other inmates who wish to place telephone calls the same day.

5. *Medical Services*

- a. Doctor's sick call shall take place in PCC clinic each week, absent a medical or custody emergency which prevents the medical doctor from conducting said sick call. In the event of such an emergency, doctor's sick call will be rescheduled as soon as possible. Sick call conducted by Medical Assistants shall continue to take place Monday through Friday.
- b. Neither custody officers nor inmate workers shall have access to medical or psychological records for death-sentenced inmates, except that custody officers shall be permitted to carry these files when escorting an inmate to any destination where said records are needed.
- c. A medical assistant shall pass out the evening medications rather than a custody officer except in the

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event of a security emergency. The medication shall be handed directly to the inmate.

*5 d. During sick call, inmates may obtain medical services request forms from the Medical Assistant to attend the dental or eye clinic. These request forms may also be obtained from the death row caseworkers or custody staff. After obtaining and filling out the request form, the inmate shall send the request to the hospital. Within eight working days of receipt of the request, the inmate shall be escorted to the appropriate clinic.

e. Medication prescribed for an inmate shall be dispensed within 24 hours, or sooner if required by the prescription, and after that shall be dispensed at the intervals required on the prescription.

6. Mental Health Care

a. A mental health care provider who has at least a Master's Degree is psychology and at least one year of professional experience or its equivalent shall be assigned to death row to provide the services set forth below.

b. All newly admitted inmates shall be psychologically evaluated within two weeks as a part of the reception process. Defendants reserve the right to seek a court order in state court to provide treatment to an inmate who declines such care if defendants believe such care is medically advisable.

c. The psychologist shall make referrals to a psychiatrist whenever the evaluations or classification team meetings (see paragraphs 6(e) and 7, *infra*) indicate that psychiatric care is advisable.

d. The psychiatrist shall make referrals to a State Mental Hospital if appropriate.

e. The death row psychologist shall sit on the death row classification committee, but is not necessarily a voting member (see paragraph 7, *infra*).

f. The death row psychologist shall write and implement treatment programs when appropriate after evaluating each inmate. In the event that medication is a part of the treatment program, a referral shall be made to a psychiatrist who shall evaluate the inmate prior to prescribing medication.

g. All prescriptions for psychotropic, antipsychotic or hypnotic medication will be reviewed on a regular basis by a psychiatrist.

h. The caseworkers who are assigned to death row shall be given mental health care training concerning the detection of mental health problems, and death and dying.

i. All inmates not under treatment shall be re-evaluated by the death row psychologist once every year and, if necessary, shall be provided treatment as prescribed above.

j. All medical and psychological records shall be confidential as provided in § 217.075 and § 217.205, RSMo.(1986).

7. Classification

a. The Classification Policy at PCC for death-sentenced inmates contemplates 4 classifications: Minimum Custody CP; Medical Custody CP; Close Custody CP; Administrative Segregation CP. Additionally, death-sentenced inmates can be placed on disciplinary segregation status for 10 days or less pursuant to Division Regulation 1S21-1.4 (212.010). Protective Custody or security needs may also require an individual be placed on no contact status with one or more death-sentenced inmates (said status may include some or all of one privileges of the classification the inmate is assigned when placed on full or partial no contact status).

*6 The Classification Policy is intended to give inmates greater privileges commensurate with good behavior.

b. Any future modifications to the classification system proposed by defendants shall be furnished immediately to counsel for plaintiff class, and counsel shall be afforded at least 7 days in which to comment before any such modifications are adopted.

c. Defendants shall seek prior approval of the Court for any modifications of the classification system which *are inconsistent* with the terms and intent of this decree, otherwise court approval is not warranted. If defendants believe that modification is immediately necessary to preserve the security and safety of the inmates of staff, which is inconsistent with the Consent Decree, such modification may be implemented on an emergency basis without prior approval of the Court, provided that approval is sought promptly thereafter. After appropriate review, the Court may delete or alter the modifications to conform to the terms and intent of this decree.

d. The classification system, and any subsequent modifications of the classification system, shall be printed and distributed by defendants to every member of the plaintiff class.

8. Staffing

a. Custody staff for death row shall receive administrative segregation training within three months of being

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assigned to death row. Administrative segregation training shall include instruction as to the special needs of death row inmates, the appellate and post-conviction process in death cases, and the requirements of this decree.

9. Recreation

a. Minimum Custody death-sentenced inmates will be given the same opportunity for outdoor and indoor recreation at PCC recreational facility as are general population PCC inmates.

b. Medium Custody death-sentenced inmates will be given the opportunity for indoor and outdoor recreation during their day room access.

c. Close Custody and administration segregation death-sentenced inmates will be given the opportunity for one hour of recreation every other day.

10. Fire Safety

a. A fire safety evaluation of death row will be conducted jointly by defendants' consultant, Mr. Donald Bussel, and by plaintiffs' consultant, Mr. Ward Duel. Defendants will pay Mr. Duel's reasonable fees and expenses for his work on the evaluation and subsequent inspections. The consultants will prepare a report, recommending necessary fire safety measures which (i) must be implemented immediately, (ii) must be implemented in the near future, and (iii) are to be achieved by capital improvements. Defendants will implement all fire safety measures recommended by the consultants, and will make a good faith effort to obtain appropriations from the Missouri General Assembly (see pp. 2-3, *supra*) if any such measures require capital improvements.

b. If the two consultants disagree as to whether any particular fire safety measure is necessary, the disagreement shall be submitted to the Court for resolution. Following adoption of a final fire safety plan, the two consultants shall inspect PCC once to ensure the necessary fire safety measures have been implemented.

11. Visiting

*7 a. Defendants will make every effort to make a contact visit available to attorneys who wish to visit a death-sentenced inmate and have notified defendants 48 hours in advance, except that inmates who are on administrative segregation or punitive segregation status shall receive a noncontact visit. All attorney visits for inmates with execution dates will be contact visits.

b. Minimum Custody inmates may have up to 4 contact visits per month which may last up to 4 hours each, with up to 4 visitors each visit. The days these visits may occur will be set by PCC staff.

c. Medium Custody inmates may have up to 2 medium contact visits per month which may last up to hours per visit, with up to 2 visitors each visit. The days these visits may occur will be set by PCC staff.

d. Close Custody and administrative segregation inmates may have 1 no-contact visit per month, lasting 1 hour, with 1 visitor. The day this visit may occur will be set by PCC staff. Close Custody inmates or inmates serving disciplinary segregation time may have contact visitation only in the discretion of the Superintendent of PCC.

12. Education

Defendants will provide inmates with an education program for G.E .D.

13. Lighting

a. Defendants will supply inmates with light bulbs sufficient to provide 20 footcandles of light at the bed and desk level.

14. Sanitation

a. An environmental and sanitation evaluation of death row and all other areas where food for death row inmates is prepared or stored will be conducted jointly by defendants' consultant, Mr. David Stull (or in his absence another representative of the Missouri Department of Health), and by plaintiffs' consultant, Mr. Ward Duel. Defendants will pay Mr. Duel's reasonable fees and expenses for his work on the evaluation and subsequent inspections. The consultants will prepare a report delineating all environmental and sanitary measures which are necessary to protect the health and safety of death row inmates. The report will recommend measures which (i) must be implemented immediately, (ii) must be implemented in the near future and (iii) are to be achieved by capital improvements. The parties will be given an opportunity to comment on the consultants' recommendations prior to the consultants' recommendations becoming finalized. Defendants will implement all environmental and sanitary measures recommended by the consultants, and will make good faith efforts to obtain appropriations from the Missouri General Assembly (see pp. 2-3) if any such measures require capital improvements.

b. If the two consultants disagree as to whether a

particular environmental or sanitary measure is necessary, the disagreement shall be submitted to the Court for resolution. Following adoption of a final environmental and sanitation plan, the two consultants shall inspect PCC once that all necessary environmental and sanitary measures have been implemented.

15. Feeding

Defendants will make good faith efforts to provide death row inmates with meals on the same schedule that applies to feeding of general population inmates.

16. Equal Access

*8 All inmates on death row shall have equal access to all rights and privileges conferred upon persons within their classification status by this decree, and to all other programs and facilities according to their classification and security status.

17. Inspections

Until such time as the Court determines that full compliance has been achieved with all provisions of this decree, the attorneys for the plaintiff class shall be allowed access to the death row walks and recreation areas upon 24-hour advance notice to the attorneys for defendants.

18. Reports

For at least six months from the date of final approval of this decree, defendants shall submit a quarterly report to the Court, with a copy to the attorneys for the plaintiff class, detailing the state of their compliance with each and every provision of this decree.

19. Implementation

a. Counsel for the plaintiff class will bring any complaints of noncompliance to the attention of defendants' counsel prior to initiating any court action. The parties will attempt in good faith to resolve all such disputes between themselves in the first instance.

b. Defendants' counsel will notify counsel for the plaintiff class of any proposed modification of the rights and privileges accorded plaintiffs by this decree prior to seeking formal court approval for any such modifications. The parties will attempt in good faith to resolve all disputes concerning such modifications between themselves in the first instance.

c. If defendants are unable to implement fully the terms of this decree, despite their best efforts, plaintiffs are free to seek such other and further relief from the Court as may be necessary to bring about elimination of the conditions which this decree seeks to remedy.

20. Jurisdiction

This Court shall transfer jurisdiction over this matter to the Eastern District of Missouri to insure compliance with the foregoing provisions until such time as all provisions of this decree have been fully implemented.

It is hereby

ORDERED that the Modified Consent Decree is approved. It is further

ORDERED that plaintiffs' motions for a protective order, to compel enforcement of consent judgment, sanctions, a temporary restraining order, and to replace plaintiffs' counsel are denied. It is further

ORDERED that this action is transferred to the United States District Court for the Eastern District of Missouri.